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No. 00-8452

In The

Supreme Court of the United States

DARYL RENARD ATKINS,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Virginia

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21 pp

TABLE OF CONTENTS

Page

I. RESPONDENT'S ARGUMENT HAS CONFUSED THE MANIFEST NATIONAL CONSENSUS AGAINST EXECUTING PEOPLE WITH MENTAL RETARDATION WITH THE *EVIDENCE* OF THAT CONSENSUS..... 1

II. AN EIGHTH AMENDMENT RULE PROHIBITING THE EXECUTION OF ALL PERSONS WHO SUFFER FROM MENTAL RETARDATION IS BOTH NECESSARY AND APPROPRIATE... 7

III. DARYL ATKINS IS CLEARLY AN INDIVIDUAL WITH MENTAL RETARDATION, WARRANTING PROTECTION BY A CONSTITUTIONAL RULE PREVENTING THE EXECUTION OF DEFENDANTS WITH THAT DISABILITY 13

CONCLUSION 15

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Coker v. Georgia, 433 U.S. 584 (1977).....6, 7

Cooper v. Oklahoma, 517 U.S. 348 (1996)..... 13

Enmund v. Florida, 458 U.S. 782 (1982).....6, 7

Ford v. Wainwright, 477 U.S. 399 (1986)..... 2, 6, 7

Medina v. California, 505 U.S. 437 (1992)..... 13

Penry v. Lynaugh, 492 U.S. 302 (1989)..... 1

Smith v. Robbins, 528 U.S. 259 (2000)..... 13

Thompson v. Oklahoma, 487 U.S. 815 (1988)..... 6, 7, 8

STATE CASES

Fleming v. Zant, 386 S.E.2d 339 (Ga. 1989)..... 5

State v. Smith, 574 P.2d 548 (Kan. 1977)..... 3

Van Tran v. State, 2001 WL 1538508, ___S.W.3d ___ (Tenn. Dec. 4, 2001)..... 5

STATE CONSTITUTION

N.M. Const. art. 4, § 34..... 5

FEDERAL STATUTES

18 U.S.C. § 3596(c) (1994).....2, 3

21 U.S.C. § 848(l) (1988).....2, 3

TABLE OF AUTHORITIES – Continued

Page

STATE STATUTES

Ariz. Rev. Stat. Ann. § 13-703.02 (C) and (F) (West 2001)..... 4

Ark. Code Ann. § 5-4-618 (Michie 1993)..... 4

Colo. Rev. Stat. Ann. § 16-9-402 (West 1993)..... 4

Conn. Gen. Stat. § 53a-46a(h) (2001)..... 2

Fla. Stat. Ann. § 921.137 (West 2001).....2, 4

Fla. Stat. Ann. § 916.106(8) (West 1998)..... 2

Ind. Code § 35-36-9-5 (Michie 1994)..... 4

Kan. Stat. Ann. § 76-12b01(d) (1984)..... 3

Kan. Stat. Ann. § 21-4623 (1994)..... 3

Mo. Ann. Stat. § 565.030 (West Supp. 2002)..... 2

Neb. Rev. Stat. § 28-105.01(3) (1998 & Supp. 2000)..... 4

N.M. Stat. Ann. § 31-20A-2.1 (Michie 1991)..... 4

N.Y. Crim. Proc. Law § 400.27 § 12(c), (e) (McKinney 1995)..... 4

N.C. Gen. Stat. § 15A-2005(a)(1)(c) (2001)..... 4

N.C. Gen. Stat. § 15A-2005(a)(2) (West 2001)..... 2

N.C. Gen. Stat. § 122C-3(22) (West 1999)..... 2

Tenn. Code Ann. § 39-13-203(a)(1) (1990)..... 4

Wash. Rev. Code Ann. § 10.95.030(2)(c) (West 1993)..... 4

TABLE OF AUTHORITIES – Continued

Page

MISCELLANEOUS

134 Cong. Rec. H7259, 7282 (daily ed. Sept. 8, 1988) 3

AAMR, *Mental Retardation: Definition, Classification, and Systems of Supports* (9th ed. 1992) 12, 13, 14

Robert H. Bruininks et al., *Adaptive Behavior & Mental Retardation*, 21 JOURNAL OF SPECIAL EDUCATION 69 (1987) 11

Emery P. Dalesio, *Inmate's Death Sentence Reduced: Killer is First Under New State Law to be Spared Because He is Retarded*, Charlotte Observer, December 15, 2001, at 4B. 7

Robert B. Edgerton, *Retarded People of Adult Years*, 19(4) PSYCHIATRIC ANNALS 205 (1989) 11

B. Maughan, et al., *Mild Mental Retardation: Psychosocial Functioning in Adulthood*, 29 PSYCHOLOGICAL MEDICINE 351 (1999) 11

Kevin S. McGrew, et al., *Relationship Between Measures of Adaptive Functioning and Community Adjustment for Adults with Mental Retardation*, 58(6) EXCEPTIONAL CHILDREN 517 (1992) 11

Model Penal Code § 4.01 3

James R. Patton, et al., *Individuals with Mild Mental Retardation: Postsecondary Outcomes and Implications for Educational Policy*, 31(2) EDUCATION & TRAINING IN MENTAL RETARDATION & DEVELOPMENTAL DISABILITIES 75 (1996) 11

TABLE OF AUTHORITIES – Continued

Page

Samuel F. Redding, *Life Adjustment Patterns of Retarded & Nonretarded Low Functioning Students*, 45 EXCEPTIONAL CHILDREN 367 (1979) 11

Andrea G. Zetlin & Gale M. Morrison, *Adaptation Through the Life Span*, in HANDBOOK OF MENTAL RETARDATION & DEVELOPMENT 481 (Jacob A. Burack et al. eds., 1998) 10

Edward Zigler, et al., UNDERSTANDING MENTAL RETARDATION (1986) 11

ATKINS REPLY BRIEF

I. RESPONDENT'S ARGUMENT HAS CONFUSED THE MANIFEST NATIONAL CONSENSUS AGAINST EXECUTING PEOPLE WITH MENTAL RETARDATION WITH THE *EVIDENCE* OF THAT CONSENSUS.

This Court has made clear that the Eighth Amendment prohibits punishments that are repudiated by a consensus of the American people. It has indicated that it looks to legislative enactments as the "clearest and most reliable objective evidence of contemporary values." *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989) (*"Penry I"*). In Respondent's view, the dramatic legislative developments in the last dozen years are of no constitutional significance. This contention misperceives the role of public consensus in Eighth Amendment jurisprudence.

Respondent and its supporting *amici* are fixated on perceived differences among the eighteen State and two Federal statutes that now prohibit the infliction of the death penalty on mentally retarded persons. They argue that those differences destroy the usefulness of the enactments in ascertaining whether there is a national consensus opposing execution of individuals with mental retardation. Each enactment is inevitably the product of a unique legislative process, involving participation by a wide array of that State's citizens, including prosecutors, defense attorneys, judges, disability advocates, and other groups. In addition, each enactment was designed to fit into the statutory context of the particular State's death penalty laws *and* its own disability laws.

However, what is truly remarkable about these twenty statutes is their substantive consistency. Each of these legislatures set out to protect people with mental retardation from the death penalty, and each chose to protect a class of people possessing the same contours and features. Variations in the phrasing of the definitions do nothing to undercut their evidentiary value regarding the Nation's consensus on this question. A number of the States either incorporated by reference an already-existing statutory definition of mental retardation,[1] or adopted such a definition by including its text in the new statute.[2]

Respondent's and its supporting *amici's* attempts to find constitutional significance in minor wording variations are unpersuasive.[3] In no instance is there any evidence that any legislature was attempting to codify

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[1] *See, e.g.*, Conn. Gen. Stat. § 53a-46a(h) (2001) (incorporating Conn. Gen. Stat. § 1-1g (1958)); Mo. Ann. Stat. § 565.030 (West Supp. 2002) (incorporating Mo. Rev. Stat. § 630.005 (West 2000)).

[2] *Compare, e.g.*, Fla. Stat. Ann. § 921.137 (West 2001) *with* Fla. Stat. Ann. § 916.106(8) (West 1998); *and* N.C. Gen. Stat. § 15A-2005(a)(2) (West 2001) *with* N.C. Gen. Stat. § 122C-3(22) (West 1999).

[3] An example of manufacturing definitional differences where none exist is the suggestion by Respondent's *amicus* Criminal Justice Legal Foundation that Congress failed to define mental retardation consistently with the enactments of the States. *See* CJLF Br. at 16. This reflects a complete misreading of the Federal statutes involved. 18 U.S.C. § 3596(c) (1994) clearly contains two separate provisions: a prohibition on executing people with mental retardation, and, in the second sentence, a codification of this Court's prohibition on the execution of defendants who are incompetent. *Cf. Ford v. Wainwright*, 477 U.S. 399 (1986). Similarly, 21 U.S.C. § 848(l) (1988), which is the

something different than the generally accepted AAMR definition of mental retardation – and certainly no evidence that there was intent to protect a smaller clinical population.[4]

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first Congressional enactment on the subject, encompasses prohibiting executing individuals with mental retardation, individuals under the age of 18, or those who are incompetent. The incompetence provision in 18 U.S.C. § 3596(c) (1994) is no more a definition of mental retardation, than the similar provision in 21 U.S.C. § 848(l) (1988) is a definition of "a person who is under 18 years of age at the time the crime was committed." While a definition of mental retardation does not appear on the face of either Federal statute, it is clear that Congress considered the AAMR definition to be the relevant definition. *See* 134 Cong. Rec. H7259, 7282 (daily ed. Sept. 8, 1988) (statement of Rep. Levin); *id.* (statement of Rep. Bartlett).

[4] The only possible exception is Kansas, where the Legislature, adopting the death penalty *de novo*, included protection of defendants with mental retardation. In the course of doing so, the Legislature incorporated the statutory version of the AAMR definition already found in Kan. Stat. Ann. § 76-12b01(d) (1984), which involves the administration of institutions for people with mental retardation, but grafted onto it the additional clause "to an extent which substantially impairs one's capacity to appreciate the criminality of one's conduct or to conform one's conduct to the requirements of law." Kan. Stat. Ann. § 21-4623 (1994). The added language, of course, is an adaptation of language found in Model Penal Code § 4.01, which totally exculpates defendants who "lack[ ] substantial capacity," as contrasted to having "substantial *impairment*." (The judicially-adopted insanity defense in Kansas does not employ the Model Penal Code formulation. *State v. Smith*, 574 P.2d 548 (Kan. 1977).) It is unclear whether the final clause was intended to identify a subset of individuals with mental retardation who were not protected by the statute, or whether it was merely meant to be explanatory. The provision has been given no interpretation by the Kansas state courts.

Similarly, differences in the procedures under which the issue of mental retardation is to be resolved,[5] evidentiary matters,[6] and provisions regarding retroactive effect

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[5] Most States have chosen to resolve the question at a pretrial bench hearing. *See, e.g.*, Ind. Code § 35-36-9-5 (Michie 1994); Colo. Rev. Stat. Ann. § 16-9-402 (West 1993). The principal advantage of a pretrial determination is that it obviates the necessity of the additional expense of a capital trial if the defendant is not eligible for the death penalty. In addition, if the matter is resolved at a pretrial proceeding, the likelihood that the case will be resolved by a plea is enhanced. A few States have chosen to resolve the question at a later stage of the proceedings. *See, e.g.*, Fla. Stat. Ann. § 921.137 (2001). Other statutes are silent as to the timing of the procedures, and one permits the issue to be resolved either pretrial or during the trial. N.Y. Crim. Proc. Law § 400.27 § 12(c), (e) (McKinney 1995).

[6] Although all the States that have addressed the issue have placed the burden of persuasion on the defense, they have differed on the level of that burden.

Several States have created evidentiary presumptions based on IQ scores. *See, e.g.*, N. M. Stat. Ann. § 31-20A-2.1 (Michie 1991) (presumption of mental retardation from score of 70 or below); Ark. Code Ann. § 5-4-618 (Michie 1993) (rebuttable presumption of mental retardation from score of 65 or below); Neb. Rev. Stat. § 28-105.01(3) (1998 & Supp. 2000) (score of 70 or below is "presumptive evidence"); Ariz. Rev. Stat. Ann. § 13-703.02 (C) and (F) (West 2001) (triggering evaluation process with a score of 75 or less, and rebuttable presumption of mental retardation with score of 65 or below, with indication that 70 is the dispositive score). These evidentiary presumptions are to be distinguished from those statutes that include an IQ score as an actual *component* of their definition of mental retardation, all of which use the score of 70. *See, e.g.*, Tenn. Code Ann. § 39-13-203(a)(1) (1990); N. C. Gen. Stat. § 15A-2005(a)(1)(c) (2001); Wash. Rev. Code Ann. § 10.95.030(2)(c) (West 1993).

of the statutes[7] offer no support for the suggestion that the manifest consensus embodied in these enactments is somehow illusory. In each of these States (and twice in the Congress), legislators made the decision to prevent the execution of individuals with mental retardation, and then fashioned a statute, appropriate to their jurisdiction, that was designed to accomplish that goal.

In addition to attempting to challenge the existence of a national consensus through the text of the statutes, Respondent and its supporting *amici* deny the existence of the consensus by arguing that the enactments are insufficiently numerous. But this argument misperceives the role of statutory enactments in ascertaining a national consensus about punishments. This Court has never suggested that determining national sentiment about an Eighth Amendment issue is a matter of "[c]ounting noses among the state legislatures." *See* CJLF Br. at 14. Rather, the accumulation of enactments by different legislative bodies constitutes *confirmation* that a claimed consensus is sufficiently widespread and sufficiently durable to survive the process to passage in different political climates

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[7] Many legislatures have a general practice that disfavors legislation that affects ongoing cases, and in at least one instance, that presumption is constitutionally required. *See* N.M. Const. art. 4, § 34. The two courts that have bridged the gap from prospective-only statutes to inmates currently under sentence of death under their state constitutions have done so upon a finding of a consensus against executing people with mental retardation in their States. *Fleming v. Zant*, 386 S.E.2d 339 (Ga. 1989); *Van Tran v. State*, 2001 WL 1538508, ___S.W.3d ___ (Tenn. Dec. 4, 2001).

and divergent legislative settings. The legislative developments of the last dozen years certainly meet that standard.

The central misunderstanding in Respondent's argument is mistaking the statutes for the consensus they reveal. The punishments prohibited by the Eighth Amendment are not rendered unacceptable because of a compilation of statutes; they are unacceptable because they are inconsistent with the American people's collective standards of decency. The role of the statutes is evidentiary. Their purpose is to assure the Court, which has been understandably wary of relying on indicia of public opinion that may prove illusory or ephemeral, that this sentiment is true and reliable. See *Thompson v. Oklahoma*, 487 U.S. 815, 826-831 (1988) (plurality opinion); *id.* at 849-852 (concurring opinion of Justice O'Connor). This Court's opinions in cases like *Thompson; Ford v. Wainwright*, 477 U.S. 399 (1986); *Enmund v. Florida*, 458 U.S. 782 (1982); and *Coker v. Georgia*, 433 U.S. 584 (1977), do not prescribe a simplistic recipe or numerical formula for ascertaining a consensus. Rather, the cases reflect something more akin to a "totality of the evidence" test, with statutory enactments as an indispensable component of any claim of a settled national agreement. In this case, the totality of the available evidence reveals a clear and unmistakable consensus of the American people opposing the execution of individuals with mental retardation.

II. AN EIGHTH AMENDMENT RULE PROHIBITING THE EXECUTION OF ALL PERSONS WHO SUFFER FROM MENTAL RETARDATION IS BOTH NECESSARY AND APPROPRIATE.

Although Respondent argues that the current system "adequately protect[s] the interests of mentally retarded capital defendants," (Resp. Br. at 28), it does not contest the fact that the sentencing scheme in States like Virginia can result in death sentences for defendants with mental retardation. *Id.* at 31-33.[8] This is acceptable, according to Respondent, because defendants with mental retardation who are tried must be competent to stand trial and may potentially be eligible for outright acquittal because of their disability,[9] *id.* at 29, and because of heterogeneity among people with mental retardation. *Id.* at 19-25.

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[8] Respondent cites to several cases of defendants whom Respondent believes to have mental retardation who have been sentenced to death, and concludes that this proves that juries and courts "indisputably are capable of considering and giving full effect to 'mitigating evidence of mental retardation in imposing sentence.' " Resp. Br. at 31. It is unclear how the mere recitation of the cases demonstrates the correctness of the sentences imposed. The Legislature of one of the States cited, North Carolina, has concluded otherwise and one of the defendants cited has since had his death sentence vacated under the new North Carolina statute. *See* Emery P. Dalesio, *Inmate's Death Sentence Reduced: Killer is First Under New State Law to be Spared Because He is Retarded*, Charlotte Observer, December 15, 2001, at 4B.

[9] The notion that competence to stand trial and other such procedures are an argument against Constitutional protection of people with mental retardation is unpersuasive. Procedural protections were available, of course, in every circumstance in which the Court has recognized the need for categorical Eighth Amendment protection. *See, e.g., Thompson; Ford; Coker; Enmund.*

It is a truism that there are differences among people with mental retardation, as there are within any group. That fact alone is not dispositive of the issue whether the entire class of mentally retarded persons deserves Eighth Amendment protection from capital punishment. For example, minors under the age of 16 (*see Thompson*) are individuals with their own personalities (*cf.* Resp. Br. at 23) who differ from one another in many respects including intelligence, spanning the full range from intellectual brilliance to mental retardation. What matters for Eighth Amendment analysis is not whether there are differences, but rather *the constitutional relevance of the trait or traits that all members of the group have in common*. In the case of minors under the age of 16 (or 14 or 12 or any other age), the shared traits are limited maturity and duration of life experience. For individuals with mental retardation, the characteristics that *all* hold in common are the components of the definition: substantially reduced intellectual functioning, which causes disabling impact on the person's life, and which has existed since birth or early life. Every individual who has mental retardation shares these characteristics.

So the real issue is the relevance of these traits to the culpability of defendants facing capital charges.[10] The relevance of mental retardation to affected individuals' level of understanding of their acts, and thus their responsibility for them, has been universally recognized.

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[10] This, of course, parallels the policy judgment that was reached by each of the legislative bodies that enacted categorical protection from the death penalty for individuals with mental retardation.

And, for all of its belaboring of the diversity among mentally retarded individuals, Respondent's brief conspicuously fails to contest the demonstration made at pages 22-32 of Petitioner's brief that the defining characteristics of retardation – the features common to all persons diagnosed as mentally retarded – are disabling in the precise dimensions recognized by this Court's Eighth Amendment jurisprudence as bearing on the requisite personal culpability to justify a death sentence. Respondent is reduced to arguing that differences in capabilities among mentally retarded individuals preclude addressing the constitutional issue in terms of the class as a whole. The crux of this argument appears to be that some individuals with mental retardation are more able to improve their adaptive functioning than others, so the entire group cannot be treated collectively for purposes of Eighth Amendment adjudication. The argument fails for two basic reasons.

First and most important, the mere existence of differences in abilities among people with mental retardation is not dispositive of the question whether those at even the highest level of functioning have the degree of culpability demanded by the Eighth Amendment as the predicate for a constitutional sentence of death. Respondent simply assumes that since there are differences, some people with mental retardation *must*, of necessity, have a sufficiently high level of culpability to warrant punishment by death for capital crimes. But this Court has insisted that the death penalty is reserved for murderers with the highest level of personal blameworthiness and culpability – the worst of the worst. It is our contention that *no* individual with measured intelligence falling

in the lowest 2½ percent of the population comes within that category.

Second, Respondent is telling a half truth at best when it asserts that some mentally retarded persons are capable of undergoing an improvement in adaptive skills. The other and more relevant half of the truth is that the precondition for such improvement on the part of *any* mentally retarded person is a level of external assistance and support that may or may not be forthcoming, depending upon circumstances over which he or she has absolutely no control. As we noted at page 32 of Petitioner's brief, any occurrence of significant improvement in skill areas and basic functioning is crucially dependent upon educational and supportive services which a retarded person's familial, social, and economic circumstances sometimes do, but all too often do not, make possible and actually deliver. Pet. Br. at 32.

This point is not merely acknowledged but emphasized by the very authorities Respondent cites (Resp. Br. at 20-25) to support its assertion that mentally retarded individuals "are not a homogeneous group" but differ in their potential for adaptive improvement.[11] Indeed, the

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[11] DSM-IV-TR at 47 ("Individuals who had Mild Mental Retardation earlier in their lives manifested by failure in academic learning tasks may, with appropriate training and opportunities, develop good adaptive skills in other domains and may no longer have the level of impairment required for a diagnosis of Mental Retardation"); Andrea G. Zetlin & Gale M. Morrison, *Adaptation Through the Life Span*, in HANDBOOK OF MENTAL RETARDATION & DEVELOPMENT 481, 492 (Jacob A. Burack et al. eds., 1998) ("[S]upport systems are vitally important and are linked to the maintenance of health, social functioning, and

whole point of the literature collected by Respondent – with no apparent awareness of this irony – is that all

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psychological well-being. Within the population of adults with mental retardation, success in the community is significantly related to the amount of guidance and support available from others."); Robert H. Bruininks, et al., *Adaptive Behavior & Mental Retardation*, 21 JOURNAL OF SPECIAL EDUCATION 69, 69 (1987) ("[T]here are still critical needs for the development of sound theories and models of adaptive behavior to guide future research and practice, especially in the design of interventions to enhance the adjustment and opportunities for people with disabilities."); Robert B. Edgerton, *Retarded People of Adult Years*, 19(4) PSYCHIATRIC ANNALS 205, 208 (1989) (noting a critical need for research on the availability and quality of support services for certain groups of mentally retarded individuals, including those not diagnosed in early years and those who live in poverty, "who may now be neglected"); Edward Zigler, et al., UNDERSTANDING MENTAL RETARDATION 222 (1986) ("Only through a closer examination of what is best for each retarded individual . . . can we know how best to provide appropriate care."); B. Maughan, et al., *Mild Mental Retardation: Psychosocial Functioning in Adulthood*, 29 PSYCHOLOGICAL MEDICINE 351, 365 (1999) ("From a practice view-point, appropriate and accessible supportive services in adulthood would appear to be urgent needs for many individuals with MMR [mild mental retardation]."); Kevin S. McGrew, et al., *Relationship Between Measures of Adaptive Functioning and Community Adjustment for Adults with Mental Retardation*, 58(6) EXCEPTIONAL CHILDREN 517, 527 (1992) (further research can "provide important information to guide the development of training and intervention to improve the range of choices, integration, and quality of life for persons with mental retardation"); James R. Patton, et al., *Individuals with Mild Mental Retardation: Postsecondary Outcomes and Implications for Educational Policy*, 31(2) EDUCATION & TRAINING IN MENTAL RETARDATION & DEVELOPMENTAL DISABILITIES 75, 83 (1996) ("It is a common misconception that persons with mild mental retardation are only minimally impaired and therefore not in need of substantial services."); Samuel F. Redding, *Life*

mentally retarded individuals share a critical need for support services if they hope to experience meaningful growth in adaptive behavior. Yet the availability and delivery of these support services are, for any given individual with mental retardation, a matter beyond his or her control. To argue that a mentally retarded individual like Daryl Atkins should be subjected to the penalty of death on the ground that *some* individuals with mental retardation *could* be capable of adaptive improvements *under optimal conditions created by skilled and sophisticated training and support* makes neither constitutional nor common sense.

The people of this country, through their Congress, and those of eighteen States, through their legislatures, have found it both appropriate and practical to address this issue by banning the execution of people with mental retardation as a class. There is nothing about the definition of mental retardation or about the composition of the group of people who have the disability that should dissuade this Court from treating them as a class for Eighth Amendment purposes.[12]

Adjustment Patterns of Retarded & Nonretarded Low Functioning Students, 45 EXCEPTIONAL CHILDREN 367, 368 (1979) (comparing adjustment of mentally retarded and nonretarded low-functioning students and finding that the mentally retarded group "exhibited life adjustment patterns which [were] . . . weak by comparison" to the nonretarded group). See also AAMR, *Mental Retardation: Definition, Classification, and Systems of Supports* 7 (9th ed. 1992): "With appropriate supports over a sustained period, the life functioning of the person with mental retardation will generally improve."

[12] *Amicus* CJLF urges this Court, if it grants relief in this case, to weigh in on the issues of procedural implementation.

III. DARYL ATKINS IS CLEARLY AN INDIVIDUAL WITH MENTAL RETARDATION, WARRANTING PROTECTION BY A CONSTITUTIONAL RULE PREVENTING THE EXECUTION OF DEFENDANTS WITH THAT DISABILITY.

Respondent's attempt to portray Atkins as an individual who does not have mental retardation is without merit. The clinical evaluation by Dr. Nelson, *the only witness who actually tested Atkins*, clearly concluded that he had mental retardation.[13] And with good reason.

Daryl Atkins has a measured intelligence that places him in the lowest one percent of the population. (JA 274.) It is beyond dispute that this score constitutes "significantly subaverage" intellectual functioning. *See* AAMR, *Mental Retardation: Definition, Classification, and Systems of*

See CJLF Br. at 23-27. In our view, the resolution of any constitutional issues raised by State procedures for determining whether a defendant has mental retardation is "sufficient unto the day thereof." Those questions have not been briefed, or even identified, at this time. If such issues arise in particular States, their disposition should follow full consideration of their merits following fully briefed argumentation. *See generally Medina v. California*, 505 U.S. 437 (1992); *Cooper v. Oklahoma*, 517 U.S. 348 (1996); *Smith v. Robbins*, 528 U.S. 259 (2000). Anticipatory *dicta* are unnecessary.

[13] Testimony of Dr. Nelson. JA 439. Respondent claims that Dr. Nelson was the only individual to find Atkins to have mental retardation. Resp. Br. at 46. This ignores the fact that Dr. Brown's report that Atkins' "intellectual skills seemed to be in keeping with the previous diagnosis of mild mental retardation" (JA 331), and added that "it is my professional opinion, to a reasonable degree of medical certainty, that [this] diagnostic assessment is the most appropriate for Daryl Atkins." JA 332.

Supports (9th ed. 1992). The other two components of the definition of mental retardation, impairment of functioning and age of onset, *id.* at 1, are also fully satisfied in this case. The record is clear that Atkins' mental impairment has limited his functioning in numerous areas of his life. And "limited intellect has been a part of Daryl his entire life." (JA 278.)

The only testimony inconsistent with this conclusion came from the State's witness, Dr. Samenow, who, by his own admission, did not administer a scientifically accepted and clinically valid intelligence test to Atkins. Instead, he predicated his evaluation on isolated items that he plucked out of the IQ test administered by Dr. Nelson, other isolated items from an outdated memory scale, and an assortment of anecdotal observations and oddments collected through impromptu conversation. (*See* Pet. Br. 17-20.) His conclusion that Atkins was "of average intelligence, at least" (JA 476), reached without the systematic clinical testing that all professionals recognize as the necessary precondition for an evaluation of mental retardation[14] and inconsistent with all of the other evidence in the case, is inherently untenable. Daryl Atkins' possession of a few polysyllabic vocabulary words, the ability to memorize a moderate number of discrete facts (and even a recipe), and some rudimentary self-care skills are not inconsistent with a diagnosis of mental retardation. (*See* Pet. Br. 47-49.)

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[14] *See, e.g.*, Brief of *Amici Curiae* American Psychological Association, American Psychiatric Association, and American Academy of Psychiatry and the Law at 12-21.

CONCLUSION

The judgment of the Virginia Supreme Court upholding the imposition of a sentence of death on Daryl Atkins should be reversed.[15]

Respectfully submitted,

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[15] Pages 13-17 of Respondent's brief reiterate for the third time the jurisdictional argument made by Respondent in its BIO and in its motion to dismiss certiorari as improvidently granted, which the Court has denied. The argument is still meritless for the reasons stated in Petitioner's opposition to the latter motion.